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In the Supreme Court of the United States

OCTOBER TERM, 1983

OCEANIC CONTRACTORS, INC. and
INSURANCE COMPANY OF NORTH AMERICA
(a/k/a INA CORPORATION)

Petitioner

VERSUS

LELAND CORMIER

Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES

BRIEF OF LELAND CORMIER IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether or not a longshoreman, a United States citizen, employed by an American owned company, is entitled to the warranty of unseaworthiness under *Sieracki* if he is injured outside the continental United States and not covered by the Longshoremen's and Harbor Workers' Act.

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STATEMENT OF THE CASE

Leland Cormier sued Oceanic Contractors, Inc. and its insurer, Insurance Company of North America, for an injury he allegedly sustained while working in Dubai, United Arab Emirates. Plaintiff was engaged as a "welder-foreman" and, in that capacity, he supervised work done in defendant's marine department overseas. His work was divided between boats and barges tied at the dock and duties at the repair yard and fabrication facility on the adjoining land. The accident occurred when the plaintiff was returning to the dock and fell while descending a ladder

positioned next to and connected to a barge owned by Oceanic, and undergoing repairs at its facility.

Suit was filed in the Eastern District of Louisiana alleging a cause of action under the Jones Act and General Maritime Law. On defendant's motion, the Jones Act claim was dismissed; no appeal was taken from this judgment.

The case was tried without a jury, the Honorable Fred A. Cassibry, Judge presiding. Having ruled that plaintiff was not a "seaman" for purposes of the Jones Act, the Trial Court further determined that plaintiff was not covered as a "maritime employee" for purposes of the Longshoremen's and Harbor Workers' Act (LHWCA). After trial on the merits, the Court found that the defendant was not negligent and that plaintiff was not contributorily negligent. However, the Court concluded that plaintiff was entitled to a warranty of seaworthiness under the *Sieracki* doctrine, and determined that defendant's vessel was unseaworthy because of the condition of the ladder. A judgment was entered in plaintiff's favor, awarding him a total of $262,256.00 for past and future wage loss, disability and pain and suffering.

The Fifth Circuit Court of Appeals affirmed the District Court, relying upon *Aparicio v. Swan Lake,* 643 F.2d 1109 (5th Cir. 1981). The petition for Rehearing En Banc was denied.

SUMMARY OF THE ARGUMENT

A. *Normile* and *Aparicio* are not in conflict, because the longshoreman involved in *Normile* was covered by the LSHWA, whereas the longshoreman in *Aparicio* was not covered by the LSHWA.

B. A longshoreman who is not covered by the LSHWA, and not entitled to the benefits thereof, should not be denied his remedy for unseaworthiness under *Sieracki.*

ARGUMENT

The opposition contends that as to the issue presented herein, there is a direct conflict between the Ninth Circuit decision in *Normile v. Maritime Company of the Philippines,* 643 F.2d 1380 (9th Circuit, 1981) and *Aparicio v. Swan Lake,* 643 F.2d 1109 (5th Circuit, 1981).

We do not agree. In *Normile v. Maritime Company of the Philippines, supra,* a federally employed longshoreman sustained injuries in the course of his employment in the Continental United States and alleged a cause of action for unseaworthiness under *Seas Shipping Company v. Sieracki,* 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946).

The plaintiff in *Normile, supra,* argued that because he was a federal employee he was not covered by the LSHWA, and, therefore, although Congress took away the unseaworthiness remedy with respect to private longshoremen, it was left intact with respect to public longshoremen.

The Ninth Circuit rejected plaintiff's argument and held that the 1972 amendment to the LSHWA applied to public as well as private longshoremen.

However, it should be noted that the Ninth Circuit made the following comments, which we intend to refer to later. The Ninth Circuit stated at page 1382—Footnote 2:

> "This conclusion does not leave plaintiff without adequate remedy. The Federal Employees' Compensation Act, 5 U.S.C., 8101 *et seq.*, entitles him as a federal employee to workmen's compensation virtually *identical* to that afforded by the Longshoremen's Act. Further, he can still recover from defendant under the Longshoremen's Act upon a showing of negligence. 33 U.S.C. 905(b). (emphasis added)

We further quote from pages 1382 and 1383 and footnote 4:

> "Though the Congressional intent is worth noting, we do not find it controlling. Indeed, were our opinion to hinge solely on statutory construction, rather than on the analysis in Part I, *ante*, we would never have reached the issue of legislative intent in the face of such a clear statutory mandate. The 1972 amendments eliminate longshoremen's actions for unseaworthiness only as to persons "*covered under this chapter.*" 33 U.S.C. 905(b). The whole chapter, in turn, is inapplicable to federal employees. 33 U.S.C. 903(a)(2). (The exclusion of federal employees was part of the original Longshoremen's Act of 1927. Congress altered part (a)(1) of this section in the 1972 Amendments, but left the exclusion for federal employees in part (a)(2) intact.) The statute is, accordingly, expressly inapplicable to one in plaintiff's position. Therefore, as a matter of simple statutory construction Congressional intent is not relevant." (emphasis added)

In *Aparicio v. Swan Lake, supra*, the plaintiff was also a federally employed longshoreman, however, he was injured in the Panama Canal Zone which is *not* included within the territorial limits of the LSHWA. We quote from

page 1117 and footnote 14.

> "The coverage of the LHWCA is defined by 33 U.S.C. 903 which precludes coverage under the act for an "officer or employee of the United States or any agency thereof..." 33 U.S.C. 903(a)(2). That provision also limits the territorial coverage of the act to "the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining areas customarily used by an employee in loading, unloading, repairing or building a vessel)." 33 U.S.C. 903(a). Section 902(9) defines United States in a geographical sense as "the several States and Territories and the District of Columbia, including the territorial waters thereof." 33 U.S.C. 902(9). The navigable waters of the Panama Canal Zone are not "navigable waters of the United States" for purposes of LHWCA coverage. *Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955, 960 & n.16 (5th Cir., 1971); *Panama Agencies Co. v. Franco*, 111 F.2d 263, 265 (5th Cir., 1940). Thus by virtue of both the exclusion from coverage by federal employees and the territorial restrictions on the coverage of the LHWCA, these federally-employed linehandlers injured in the Panama Canal Zone are not "covered" persons within the LHWCA."

The Fifth Circuit held that since the plaintiff was not covered by the LSHWA that he could maintain an action for unseaworthiness under *Sieracki, supra.*

Judge Rubin at pages 1117 and 1118 stated the following:

> "Like most legislation, the 1972 amendment

was a compromise. The legislative termination of the warranty of seaworthiness owed to the *Sieracki* seaman and the concomitant ending of the stevedore's contractual indemnification of the shipowner for that liability were enacted as the *quid pro quo* for the increase in compensation benefits payable under the LHWCA (15) and for a limited right to recover in tort from the vessel for negligence. 33 U.S.C. 905(b). Aparicio and the other maritime workers who are parties to the FECA scheme contend that, not having received the benefit of the bargain struck by Congress in the form of increased compensation payments provided those covered by the LHWCA, they should not be required to relinquish their *Sieracki* seaman status and their unseaworthiness action."

"At the time of the 1972 amendments, Congress was not unaware of the level of FECA benefits relative to those payable under the LHWCA. The legislative history of the LHWCA amendments indicates that at least certain members of Congress considered that the FECA benefits had already been raised to an adequate level.(16) In debating the proposed amendments, the congressmen noted the great disparity between maximum benefit levels available under FECA and the LHWCA, 118 Cong. Rec. 36386 (Oct. 14, 1972), but did not compare the benefits payable pursuant to the LHWCA with the FECA benefits available to a federal employee engaged as a maritime worker who, had he been privately employed and within the territorial coverage of the LHWCA, would have been covered by the LHWCA."

"The failure of the congressman to compare the benefits payable under the LHWCA to those available to a harbor worker or longshoreman

covered by FECA reinforces what is evident from the whole of the legislative history of the 1972 amendments: Congress simply did not consider the possibility that maritime workers not covered by the LHWCA qualified for *Sieracki* seaman status under the existing caselaw. It was not unnatural for Congress to focus its effort to abolish the *Sieracki-Ryan* contract on the maritime workers covered by the LHWCA, the workers who constituted the bulk of those to whom the *Sieracki* doctrine is applicable, without considering the fate of those relatively few *Sieracki* seamen not covered by that statute. Nevertheless, we do not consider the failure of these FECA maritime workers to receive the benefits of that compromise dispositive of the availability of the *Sieracki* remedy in this case."

"The Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime, and 'Congress has largely left to (the Supreme Court) the responsibility for fashioning the controlling rules of admiralty law.' *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20, 83 S.Ct. 1646, 1650, 10 L.Ed.2d 720." *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409, 95 S.Ct. 1708, 1715, 44 L.Ed.2d 251, 262 (1975). "Admiralty law is judge-made law to a great extent..." *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. at 259, 99 S.Ct. at 2756, 61 L.Ed.2d at 526. In *Sieracki* and *Ryan* the Supreme Court formulated remedies to deal with the peculiar perils faced by maritime workers based on policy considerations it determined to be controlling given those conditions of maritime work. Until Congress abrogates the remedies created by the Supreme Court as they apply to maritime workers not covered by the LHWCA, those workers remain entitled to relief and their employers and vessel owners remain bound by

the *Sieracki-Ryan* doctrine.17"

Footnote 17 on page 1118 is applicable to the case at bar.

> "Recognizing that the holding of this case is limited to those maritime workers not covered by the LHWCA who are participants in the FECA scheme, we note that the pockets of *Sieracki* seamen remaining after the 1972 amendments also may include those longshoremen and harbor workers who, though privately employed, are injured in a foreign country and thus are not within the territorial coverage of the LHWCA. *See, e.g., Grice v. A/S J. Ludwig Mowinckels,* 477 F.Supp. 365 (S.D. Ala., 1979) (privately employed longshoremen injured in Saudi Arabia). It is conceivable that American maritime law might apply in such a situation and that the maritime worker could qualify as a *Sieracki* seaman. Although the maritime workers in this case have available to them the compensation benefits payable under the FECA scheme, the worker injured outside of the territorial coverage of the LHWCA may either be covered by no compensation act or by a compensation scheme that is far more stringent in its benefits that is the LHWCA. *See Grice v. A/S J. Ludwig Mowinckels,* 477 F.Supp. at 367 n.5. The continued availability of the *Sieracki* remedy under such circumstances would assure the maritime worker an adequate recovery.

At the time of plaintiff's accident, he was earning in excess of $40,000.00 per year. His rate of compensation under the LSHWA would have been $450.00 per week plus medical benefits. Under the LSHWA if he could not return to the same type of work he would have been entitled to a wage differential for the rest of his life.

The plaintiff was in fact paid under the Louisiana State Compensation Act which provided $65.00 a week plus medical benefits until a person is discharged, regardless of disability.

The opposition asked the Fifth Circuit to recognize by judicial notice the fact that numerous companies from Louisiana have men working overseas in situations similar to that of the plaintiff. They contend that they should be entitled to the benefit of the amendment to the LSHWA in 1972, wherein the vessel owner was no longer subject to the *Sieracki* doctrine, and at the same time, be granted the absolute power to determine the amount of compensation that should be paid their injured employees, whether it be Louisiana compensation, Dubai compensation or whatever. This position was rejected by the Fifth Circuit in *Aparicio, supra.*

CONCLUSION

The *Normile* decision, *supra*, and *Aparicio* decision, *supra*, are not in conflict because the plaintiff longshoreman injured in *Normile* was covered by the LSHWA because he was injured within the territorial boundaries of the Act, whereas in *Aparicio* the plaintiff longshoreman was *not* covered by the LSHWA because the accident did not occur within the territorial boundaries of the Act.

The Fifth Circuit concluded that the amendment of the LSHWA in 1972 was a compromise wherein the maritime worker received increased benefits (five-fold) in return for losing his right to sue for unseaworthiness. As to maritime workers that are *not* covered by the LSHWA, they should retain their right to an action for unseaworthiness,

because they are not entitled to the benefits of the LSHWA.

Respectfully submitted,

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CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing Brief of Leland Cormier in Opposition to the Petition for Writ of Certiorari has been furnished to:

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on this the 1st day of September, 1983.

JOSEPH J. WEIGAND, JR.